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No. 116

# In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

*v.*

FELT & TARRANT MFG. CO.

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 14) is reported in 69 C. Cls. 204; 37 F. (2d) 977.

### JURISDICTION

The judgment of the Court of Claims was entered February 17, 1930. (R. 18.) Petition for writ of certiorari was filed May 14, 1930 (R. 18), and the writ was granted June 2, 1930 (R. 19), 281 U. S. 719. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether a refund of income and profits taxes should be granted for a matter not mentioned in a claim for refund.

2. Whether the Commissioner of Internal Revenue, by failing to object to the generality of the respondent's claim for refund and by acting on the claim so far as it was specific, waived objection to the insufficiency of the claim as to matters not specifically mentioned.

3. Whether the respondent's failure to file a specific claim for refund on the ground of exhaustion of patents was excused because at the time of filing the claim it was known that such a claim would be rejected by the Commissioner.

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 14–17.

## STATEMENT

The respondent contends, and the United States concedes, that the respondent was entitled to a deduction from gross income for the year 1917 on account of exhaustion of patents. Had this deduction been made, the respondent's taxes for 1917 would have been reduced in the sum of $26,909.50. The United States agrees that the respondent would be entitled to judgment for this amount

with interest, had the respondent filed a sufficient claim for refund, as required by Section 1318 of the Revenue Act of 1921 (*infra*, p. 15) and article 1036 of the Treasury Regulations 62 (*infra*, p. 16).

On February 2, 1923, respondent filed a waiver of its right to have its taxes for 1917 assessed within five years from the date its return had been filed. (Finding 4; R. 11.)

On February 29, 1924, the respondent filed a claim for refund on Form 843. This made no reference to any claim because of exhaustion of patents. The claim consisted merely of answers to questions on the form and the following statement (Finding 6; R. 11; Schedule A, R. 9):

> The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate [date] of, the settlement of the claim for relief. Computation has been made as follows:

| | |
|---|---|
| Total profits taxes paid | $227,789.38 |
| Less: Decrease in income taxes on account of profits taxes credit | 13,667.37 |
| Refund claimed | 214,122.01 |

> The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made.

In support of this claim the respondent filed a brief, and an oral hearing was held in the office of the Commissioner of Internal Revenue. The sole contention presented in that brief and at the hearing was that the respondent was entitled to a special assessment under Section 210 of the Revenue Act of 1917. At no time during the course of the proceedings was any question raised by respondent relative to depreciation of patents or adjustment of value of patents for invested capital purposes. (Finding 6, R. 11.) At the time of these proceedings it was the regular practice of the Commissioner to reject any claim for depletion of patents which had not been made in the original return.

On December 17, 1924, the Commissioner notified respondent that under the provisions of Section 210 of the Revenue Act of 1917 (pp. 14–15, *infra*) respondent had been overassessed, and allowed the claim for refund in the amount thus found overassessed solely because of the reaudit and special assessment under Section 210, and on February 16, 1925, rejected it as to the balance. (Finding 7, R. 12.)

On January 27, 1925, the Board of Tax Appeals, in *Appeal of Union Metal Manufacturing Co.*, 1 B. T. A. 395, decided that a taxpayer who had made a specific claim for refund was entitled to a deduction on account of exhaustion of patents, notwithstanding the fact that no such claim had been made

in the original return. In May, 1925, the Bureau announced that it had acquiesced in that decision. (IV–1 Internal Revenue Cum. Bull., p. 3.)

The respondent filed its petition in the Court of Claims on February 14, 1927, and there for the first time claimed a deduction on account of exhaustion of patents. The Court of Claims awarded it judgment for $26,909.50 with interest. (R. 13.)

## SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that the respondent should be allowed a deduction for exhaustion of patents in spite of its failure to file a specific claim for such a deduction.

2. The Court of Claims erred in giving judgment for the respondent.

## SUMMARY OF ARGUMENT

I. The respondent's claim for refund was insufficient under the provisions of the applicable statute and regulations, for the claim did not clearly set forth the facts relied upon to support it.

II. This insufficiency was not waived by the Commissioner. He was not informed that the taxpayer would seek a deduction for exhaustion of patents under this claim. He took no steps to inform the respondent that its claim was too general because the claim was sufficiently specific as to the single ground, namely, special assessment, presented to him at the hearing. There was no inten-

tional relinquishment of his right to a specific statement of the grounds relied upon by the respondent in support of its claim for refund.

III. Although at the time when the claim for refund was filed the practice of the Bureau was to reject claims for deductions for patent exhaustion which had not been made in the original return, the mere futility of filing a claim is no ground for dispensing with it. *Rock Island Railroad Co.* v. *United States,* 254 U. S. 141; *Rand* v. *United States,* 249 U. S. 503.

## ARGUMENT

### I

### NO REFUND SHOULD BE GRANTED FOR A MATTER NOT MENTIONED IN A CLAIM FOR REFUND

Section 1318 of the Revenue Act[1] of 1921 (*infra,* p. 15), provides in part:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *.

[1] The same provisions are enacted in Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343; and Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.

Article 1036 of Regulations 62[2] (*infra*, pp. 16–17) promulgated February 15, 1922, under the Revenue Act of 1921, provides in part:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.

In the instant case the Commissioner was never advised that the taxpayer claimed a deduction for patent exhaustion. In its tax return no reduction of gross income was made on such a ground. (R. 7; Petition (8).) The claim was specific in seeking a special assessment under Section 210 of the Revenue Act of 1917 (*infra*, p. 14), although it stated that the claim was filed "to protect all possible legal rights of the taxpayer." At an oral hearing before the Commissioner under this claim for refund and in its brief in support thereof, the taxpayer's sole contention was that it was entitled to a special assessment, under Section 210 of the Revenue Act of 1917 (p. 14, *infra*). Depreciation of patents was not mentioned. In fact the Commissioner never knew of the existence of the present claim or the facts on which it is based until this suit was brought.

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[2] Similar provisions were made in Article 1355 of Regulations 65, promulgated under the 1924 Act, and in Article 1352 of Regulations 62, promulgated under the 1926 Act.

In *Tucker* v. *Alexander*, 275 U. S. 228, 231, this Court said:

> Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States.

The lower Federal courts, including the Court of Claims, have held virtually without exception that under the statute and regulations a taxpayer can not recover upon a ground distinct from any presented to the Commissioner in the claim for refund. *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *Feather River Lumber Co.* v. *United States*, 66 Ct. Cls. 54, certiorari denied, 279 U. S. 837; *Jonesboro Grocer Co.* v. *United States*, 66 Ct. Cls. 320, certiorari denied, 280 U. S. 562; *National Candy Co.* v. *United States*, 67 Ct. Cls. 74, 88, certiorari denied, 280 U. S. 582; *Meinrath Brokerage Co.* v. *Crooks*, 28 F. (2d) 991 (W. D. Mo.); *Arizona Commercial Mining Co.* v. *Casey*, 32 F. (2d) 288 (D. Mass.); *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (W. D. Ky.); *Phoenix Glass Co.* v. *United States*, 34 F. (2d) 217 (W. D. Pa.); *Connell* v. *Hopkins* 43 F. (2d) 773 (N. D. Texas); *Aladdin Co.* v. *Woodworth*, 43 F. (2d) 150 (E. D. Mich.); *Solomon* v. *United States* (S. D. N. Y.), decided December 22, 1930, reported in Prentice-Hall Federal Tax Serv-

ice 1931, Paragraph 381. Apparently the only decisions to the contrary are three cases in the District of Connecticut. *Union & New Haven Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Warner* v. *Walsh,* 24 F. (2d) 449; *Warner* v. *Walsh,* 27 F. (2d) 952.

## II

### THE COMMISSIONER DID NOT WAIVE COMPLIANCE WITH THE REQUIREMENT THAT A CLAIM BE FILED SPECIFYING THE FACTS RELIED UPON

The Commissioner may waive the statutory requirement that the claim set forth the facts relied upon, but in the instant case he did not do so. There was no occasion for the Commissioner to object to the form of the claim. It specifically referred to one matter, in respect to which he acted. Neither the language of the claim nor the taxpayer's contentions under it indicated that the taxpayer intended it to cover any other matter. Indeed, it seems strained to construe the reference in the claim to "all possible legal rights of the taxpayer" as applying to anything more than the legal rights of the taxpayer in respect to the specific matter to which all other parts of the instrument clearly relate.

In *Tucker* v. *Alexander,* 275 U. S. 228, *supra,* which is relied upon by the court below, an express stipulation by counsel in open court was held a waiver of literal compliance with the statutory requirement. No such stipulation exists in the instant case. In *Black* v. *Bolen,* 268 Fed. 427 (W. D.

Okla.), *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 F. (2d) 459 (E. D. Pa.), and *Art Metal Construction Co.* v. *United States*, 35 F. (2d) 379 (W. D. N. Y.), certain statements written to the taxpayer by the Commissioner were held to be waivers. In *Howbert* v. *Penrose*, 38 F. (2d) 577 (C. C. A. 10th), a waiver was inferred from the admission in the pleadings by the Government that a claim for refund had been filed and its failure to set up the defense of generality and insufficiency.

In *Arizona Mining Co.* v. *Casey*, 32 F. (2d) 288 (D. Mass.), the taxpayer filed a claim for refund of 1917 taxes based wholly on the act of the Commissioner in reducing its invested capital. After rejection of the claim, suit was brought on the new ground that a further deduction should be allowed for depletion of its ore bodies during the year. Although the Collector conceded in his brief that one of the issues of fact was whether the taxpayer was entitled to an additional deduction for depletion, the court held (p. 291) "that the defendant did not, by his course of conduct, waive compliance with the statute and regulations," and permitted no recovery on that ground.

A waiver is the intentional abandonment or relinquishment of a known right. Cf. *Bennecke* v. *Insurance Co.*, 105 U. S. 355. The conduct of the Commissioner in the instant case can not properly be construed as constituting a waiver of his right

to a specific statement of the grounds relied upon by the respondent in support of its claim for refund.

## III

### THE RESPONDENT'S FAILURE TO FILE A SPECIFIC CLAIM FOR REFUND ON THE GROUND OF EXHAUSTION OF PATENTS WAS NOT EXCUSED BECAUSE AT THE TIME IT WAS KNOWN THAT SUCH A CLAIM WOULD BE REJECTED BY THE COMMISSIONER

At the time when the claim for refund was filed, February 29, 1924, it was the practice in the Bureau of Internal Revenue to reject claims for deductions for patent exhaustion which had not been made in the original return. This may have been the reason why the respondent failed to set forth this ground in the claim. Because of this the Court of Claims said (R. 16, 17):

> It would have been a useless and futile act to have specified in detail with respect to patent depreciation in the face of adhered-to adjudications upon the subject, and the commissioner was not deprived of any knowledge or in any way misled by the failure of the plaintiff to make a detailed claim as to patent depreciation. Had it been so made it would have been rejected upon prior holdings. Under these circumstances it is, we think, established that in so far as the intended purpose of the statute and regulations is concerned—an intent and purpose ascribed to them in various decisions of the courts—the commissioner was not denied the priv-

ilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim of February 29, 1924.[3]

We maintain that, even if the respondent had reason to expect its claim for deduction on account of exhaustion of patents to be rejected, it should have presented it to the Commissioner at the outset. His rejection could not preclude a suit, and filing the claim in the form required by the regulations is a condition precedent to the right to bring suit. The very fact that it was well understood that the claim would be rejected was the best reason for filing it if suit was contemplated. The mere futility of stating the ground of patent depletion to the Commissioner is no excuse for failing to take that step required by the statute. *Rock Island Railroad Co.* v. *United States,* 254 U. S. 141, *supra.*

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[3] This reasoning is based largely upon an incorrect statement of fact by the court as to certain dates. The practice of the Bureau in regard to claims for patent depletion was reversed by the decision in the *Union Metal Manufacturing Company* case, 1 B. T. A. 395, decided on January 27, 1925, not "in June, 1925," as the opinion below erroneously states. Because of the waiver filed by the respondent, the time for filing a claim for refund of its 1917 taxes did not expire, under Section 281 (e) of the Revenue Act of 1924 and Section 284 (g) of the Revenue Act of 1926, until April 1, 1925. A new claim for refund specifically asserting the right to a deduction for exhaustion of patents, filed before April 1, 1925, might well have been allowed by the Commissioner. Soon afterwards he announced that he acquiesced in the decision of the Board. Anyway, the respondent had an opportunity, after learning of the *Union Metal Manufacturing Co.* decision, either to amend its claim or to file a new one setting up the claim for patent depletion.

In denying recovery in the similar case of *Rand* v. *United States*, 249 U. S. 503, 510, *supra*, this Court said:

> The Act of 1912 can not be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We cannot relax its requirements—certainly not on the assumption that they might have been useless if complied with.

## CONCLUSION

It is respectfully submitted that the decision of the court below is erroneous and should be reversed, and that judgment should be entered for the United States.

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JANUARY, 1931.

# APPENDIX

## STATUTES AND REGULATIONS INVOLVED

### STATUTES

Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, provides:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of Treasury. In the case of a corpo-

ration or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Section 1318 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 314, as amended by an Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provides:

> SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 281 (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, provides:

> (e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

This was reenacted *verbatim* in Section 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67.

REGULATIONS

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

> ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a

case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

U. S. GOVERNMENT PRINTING OFFICE: 1921